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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 828

JAMES ZARICHNY, Petitioner

-vs-

STATE BOARD OF AGRICULTURE AND SARAH VAN HOOSEN JONES, WINIFRED G. ARMSTRONG, FOREST H. AKERS, FREDERICK H. MUELLER, CLARK L. BRODY, ELLSWORTH B. MORE, MEMBERS OF THE STATE BOARD OF AGRICULTURE.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

No opinions were filed by the Michigan Supreme Court in denying petitioner's petition for writ of mandamus nor was an opinion filed by that Court in denying petitioner's motion for reconsideration of that order. Neither of said orders is reported.

II

Counter-Statement on Jurisdiction

Respondents contend that the orders of the Michigan Supreme Court denying petitioner's petition for a writ of mandamus in that Court present no reviewable judgment or decree under *Section 1257, Title 28, U. S. C.*, that this conclusion necessarily must follow from the fact that there is no indication in the record that the orders of the Michigan Supreme Court necessarily involved the decision of any federal questions in denying petitioner's application for writ of mandamus, and his motion for reconsideration of said order of denial; that the orders of the Court below may very well have been based upon questions of substantive law and procedure entirely independent of any federal questions sought to be raised by the petitioner; that entirely apart from the foregoing considerations, the record discloses no substantial federal question requiring a decision by this court.

Finally respondents submit, alternatively, that if petitioner's application for mandamus in the State Supreme Court can be said to have presented any federal questions in that forum and that the Michigan Supreme Court necessarily passed upon said question, its decision against the contentions of petitioner was entirely correct on the merits.

III

Argument

It is the position of the respondents that the petition for writ of certiorari should be denied for the following reasons:

1. Plaintiff, in his petition for writ of certiorari, fails to show that this Court has jurisdiction under *Section 1257 (3), Title 28, U.S.C.* and the record before this Court is substantively deficient in establishing jurisdiction in this Court on the basis relied upon by the petitioner.

It is axiomatic that before this Court will entertain a petition for certiorari to be directed to the Supreme Court of the State of Michigan, it must affirmatively appear from the record below, either expressly or by necessary inference, that federal questions were properly presented in the Court below and that the federal questions so presented were so directly involved that the Supreme Court of Michigan could not have given its judgment without deciding such federal questions. *Cyc. of Fed. Procedure (2nd Ed.) Vol. 10, Sect. 4989, P. 422; Lynch vs. New York Ex rel, Pierson, 293 U. S. 52, 79 L. Ed. 191.* It is equally beyond question that where the record shows or will sustain the inference that the decision of the Court below rested upon independent questions not federal in character and that a decision of such questions would be sufficient to support the judgment rendered, the decision of the State Court is not properly reviewable by this court. *Cyc. of Fed. Procedure (2nd Ed.) Sect. 4993, P. 441; U.S. vs. Hastings, 296 U.S. 188, 80 L. Ed. 148.* Respondents contend that the record in the proceedings below amply justify the inference that the decision of the Michigan Supreme Court may well have been

based upon non-federal grounds amply sufficient to warrant its decision as expressed in its orders denying petitioner's application for mandamus.

It is entirely probable, and may reasonably be inferred that the Michigan Supreme Court refused to grant petitioner's application for mandamus simply because it did not appeal to the discretion of the State Court. It is well settled in Michigan law that mandamus is a discretionary writ and may be withheld in the sound discretion of the State Courts. *St. Ignace City Treasurer vs. Mackinac County Treasurer, 310 Mich. 108, 16 N.W. (2nd) 682.* The discretionary nature of mandamus is well established in other jurisdictions, and in particular it is well established in original proceedings instituted in State Courts of last resort. *34 Amer. Juris., Sect. 26, P. 824-825.* The withholding of writs of mandamus by State Courts of last resort is particularly marked in cases where the original jurisdiction of such Courts is sought and purely private rights are in issue. *34 Amer. Juris. Sect. 27, P. 825.* The simple denial without opinion of petitioner's application for mandamus does not support his contention that such action by the Supreme Court of Michigan necessarily passed upon any or all of the allegedly federal questions which petitioner sought to raise in his application to the State Court. This is well indicated in *Hoffman vs. Silverthorn, 137 Mich. 60, 100 N.W. 183,* involving a summary denial of a writ of mandaums without opinion. The Michigan Supreme Court on Page 64 of its opinion said,

> "If the decision in the mandamus proceeding was made upon the merits, we think that decision would be decisive between the parties to that proceeding and their privies. * * * It does not follow, because the mandamus was denied, that the Court passed upon the merits of plaintiff's application. That mandamus may

have been denied because no case was made that appealed to the discretionary power of the Court, because relator had a manifest legal remedy of which he could not be deprived, or because mandamus was not the proper remedy."

In a later case the foregoing decision by the Michigan Supreme Court was interpreted as standing for the proposition that in the absence of affirmative testimony it cannot be presumed that an order of the Michigan Supreme Court denying mandamus necessarily decides the merits of the controversy. *Hatch vs. Wayne Circuit Judge, 138 Mich. 184, 101 N.W. 228.* The foregoing considerations do not warrant the inference that the Michigan Supreme Court decided the question of its discretion in favor of petitioner, but rather an opposite conclusion is far more plausible. See *State of Missouri, Ex rel, Gaines vs. Canada, 305 U.S. 337, 83 L. Ed. 208,* where this Court on the basis of a written opinion by the State Court presumed that the procedural question was resolved in favor of the mandamus applicant.

It is submitted that the Supreme Court could properly have denied petitioner's application for mandamus solely as a matter of discretion and that the exercise of such discretion by the State Court should not be disturbed by this Court. See *54 Amer. Juris., Sect. 264, P. 902; Cyc. of Fed. Procedure (2nd Ed.), Sect. 4843, P. 226-227.*

Apart from the foregoing argument, it is entirely possible that the Michigan Supreme Court denied the petitioner's application for mandamus for the simple reason that the proper parties were not before the Court. Reference to the petitioner's application for mandamus as set forth in the record demonstrates that neither the State Board of Agriculture as a group or its members individually had anything whatever to do with the disciplining of the pe-

titioner or in the denial of his re-admittance. All acts complained of by this petitioner relate solely to the action of the President of Michigan State College and its Dean of Students, neither of these individuals having been made parties to the proceeding in the State Court. *Article XI, Sect. 8, Michigan Constitution of 1908,* vests the government of Michigan State College in the State Board of Agriculture. However, *Mich. Comp. Laws of 1929, Sect. 7868, Mich. Stat. Ann. 15.1134,* specifically provides that the faculty shall pass all rules and regulations necessary to the government and discipline of the college and for the preservation of morals, decorum and health. Clearly, the rules and regulations complained of by petitioner fall within the area of rules and regulations necessary for the discipline of the college, the enactment of which is vested in the faculty of Michigan State College. The President and Dean of Students in dealing with the petitioner for the infraction of such rules cannot be said to be acting as the agent for the State Board of Agriculture which had nothing to do with the establishment of petitioner's probationary status or the refusal of his readmittance. No relief by way of mandamus is spelled out against these respondents, and the only two possible parties to such a proceeding were not joined in the action as brought by the petitioner. The Michigan Supreme Court in denying the Writ of Mandamus could properly have passed on this single procedural point and yet have completely disposed of the petitioner's application.

2. Petitioner's petition for certiorari and the record in this cause do not demonstrate that any substantial federal question was presented for the consideration of the Michigan Supreme Court.

It is well settled that certiorari will be directed to the Supreme Court of Michigan only if it can be said that that

Court was confronted with a substantial federal question specially set forth by petitioner for its determination. Simply alleging that the questions presented are substantial in nature is a mere conclusion and does not establish their intrinsic worth. See *10 Cyc. of Fed. Procedure (2nd Ed.) Vol. 10, Sect. 4981, P. 388-389.* Respondents contend that the alleged federal questions as set forth in petitioner's application for mandamus in the State Court are largely conclusions of law unsupported by the facts set forth.

It is a recognized rule of law that a very wide discretion exists on the part of governing boards and officials of institutions of higher learning, in their formulation of rules and regulations pertaining to the government of their respective institutions and the discipline of their students. *Tanton vs. McKenney, 226 Mich. 245, 197 N.W. 510; Woods vs. Simpson, 146 Md. 547, 126 Atl. 882; Waugh vs. Board of Trustees, University of Mississippi, 237 U. S. 589, 59 L. Ed. 731; Gott vs. Berea College, 156 Ky. 376, 161 S.W. 204.* College authorities stand *in loco parentis* to their students insofar as disciplinary powers are concerned and courts are not disposed to interfere with such rules and regulations unless the same are palpably unreasonable or unlawful. *Gott vs. Berea College supra.* Legitimate powers of discipline and regulation over the student body vested in college authorities is not circumscribed by the physical boundaries of the school campus. *Tanton vs. McKenney supra; Steele vs. Sexton, 253 Mich. 32, 234 N. W. 436; Hamilton & Mort, The Law and Public Education, P. 471; Annotation 41 A.L.R., 1312; Waugh vs. Board of Trustees, University of Mississippi supra; Gott vs. Berea College supra.*

Respondents take issue with the statement contained on Page 14 of petitioner's brief to the effect that the petitioner was denied readmittance to Michigan State College solely by reason of his attending a public meeting off campus and

for no other reason. Reference to the respondent's answer to petitioner's application for Mandamus in the Michigan Supreme Court demonstrates that the petitioner, over a great period of time, had been on a strict probationary status by reason of his repeated infractions of school discipline. Respondents contend that petitioner's act, resulting in his being denied readmittance, cannot be divorced from his previous acts in violation of discipline in appraising the propriety of this action. These conditions coupled with the fact that petitioner's academic record deteriorated steadily during the months immediately preceding his being denied readmittance amply suffice to bring such action within the reasonable discretion of the college authorities, and to preclude interference from the courts. See *55 Amer. Juris., Sect. 22, P. 15.*

Respondents submit that, on the face of the record, petitioner's claims that his rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States were violated by the terms of his probation are colorable and devoid of merit. Rather the record shows that the terms of petitioner's probation were calculated to promote that singleness of purpose desired of all students in institutions of higher learning, which attribute was singularly lacking in the petitioner. It is admitted by petitioner that the denial of readmittance resulted from his attending a group meeting which Michigan State College authorities interpreted as violating the terms of his probation. There is nothing to indicate that the nature or the purpose of the meeting had anything to do with the refusal of admission. The President and Dean of Students of Michigan State College construed such activity as a violation of the petitioner's strict probation imposed by reason of petitioner's status as a student at Michigan State College and the disciplinary authority over him arising by reason of his status. The quality of the restrictions imposed upon petitioner cannot

be tested in the light of what would be proper were the same to be imposed upon the body politic.

The privilege of attending Michigan State College is not derived from federal sources, it is accorded by the State of Michigan. See *Hamilton, vs. University of California, 293 U.S. 245, 79 L. Ed. 343.* By accepting the privilege accorded him by the State of Michigan, the petitioner necessarily submitted himself to the broad disciplinary powers of the Michigan State College authorities. Petitioner's unwillingness to submit to the terms of his probation and his contention that the same are unreasonable, presumably because ordinary citizens might challenge such restraints upon their conduct, give rise to no federal questions. If petitioner's colorable assertions to the effect that his constitutional rights were violated in this case be accepted, any aggrieved student who happens to be in an institution of higher learning established by the law of any state may petition this Court and invoke its powers of review over the disciplinary actions of the respective faculties simply by declaring such actions to be unreasonable accompanied by summary declarations that his rights were violated under the Fourteenth Amendment. That such a situation would be subversive of discipline in all state institutions of higher learning, not to mention the secondary and primary schools, requires no further demonstration. Respondents submit that the discipline accorded to petitioner was reasonable and that, in any event, no substantial questions under the First, Fifth and Fourteenth Amendments to the Constitution of the United States are presented.

3. If it can be assumed that the Michigan Supreme Court necessarily decided petitioner's claimed rights under the First, Fifth and Fourteenth amendments adversely to petitioner, such decision was entirely correct on the merits.

Respondents incorporate by reference the authorities and argument contained in the last preceding subdivision of this brief and submit that the President and Dean of Students of Michigan State College in denying readmittance to the petitioner invaded none of petitioner's rights under the Constitution of the United States.

IV.

Conclusion

This case presents important considerations as to the policy of this Court in construing a judgment or order of a State Court of last resort from the standpoint of ascertaining whether or not substantial federal questions are presented in the state forum. More important, however, is the consideration as to the effect which this proceeding may have upon the disciplinary and regulatory powers of state college and state university authorities throughout these United States. Upon this record respondents earnestly submit that this Court in its sound discretion should deny this petition for certiorari.

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